No. 11,998

IN THE

United States Court of Appeals

For the Ninth Circuit

MICHAEL J. FANNING, individually and as Postmaster of the City of Los Angeles, California,

Appellant,

vs.

AL WILLIAMS and AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC. (a corporation),

Appellees.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR APPELLEES.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Attorney General's Report

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STATEMENT OF THE CASE.

The appellee, Al Williams, has had years of experience in the field of physical conditioning. He boxed and wrestled professionally from 1906 to 1916, when he became an instructor of the wrestling team at the Olympic Club in San Francisco. (Tr. p. 158.) During the period of the First World War he instructed soldiers, at the request of the War College, in a system of rifle disarming for self-defense purposes which he had originated. When the war ended,

he resigned to go into the work of conditioning business and professional men. (Tr. p. 158.) He opened his first establishment in San Francisco in 1920, and then one in Oakland, one in Pasadena, and three in Los Angeles, and during the depression years up to and including the present day, has been located in one establishment in Los Angeles. At one time his organization numbered about 250 employees, who conditioned over 50,000 business and professional men. (Tr. p. 159.)

Al Williams studied weight reduction from the time he became a professional athlete and has had much actual experience in the conditioning of boxers and wrestlers. (Tr. p. 160.) By this experience he learned how to decrease the weight and increase the energy by the use of selective foods and nutrition. He first became interested in concentrated nutrition in 1935, when he began experimenting with concentrated food formulas and their effect upon his own body as well as upon many others. Since that time he has revised the food schedules of at least 50,000 individuals and has applied the experience gained by such experimentation in the perfection of what is known as the "Al Williams Weight Reducing Plan". (Tr. pp. 160, 161, 165, 166, 167.)

The "Williams Plan" consists of prescribed diets (Tr. pp. 81, 82), exercise (Tr. p. 83), internal baths (Tr. pp. 211, 212), the taking with fruit juice, milk, soup or water, of certain vegetable concentrates, for the purpose of taking away hunger and the desire to overeat (Tr. p. 191), and the use of a Special Body

Massage Creme to tighten the skin and hold correct flabby, fat tissue caused by the loss of weight. (Tr. pp. 176, 177.)

On the 25th day of May, 1945, the Post Office Department filed and mailed to the appellees a memorandum recommending the issuance of a show cause order against the appellees together with a letter in the form of an order to show cause, designating the memorandum as a "Specification of Charges" and informing the appellees that the charges would be taken up for disposition on the 20th of June, 1945. (Tr. pp. 10, 11.) Appellees filed an answer to the charges and attended the hearing with their counsel. On or about the 10th of August, 1945, the appellees filed a motion to reopen the case before the Post Office Department for the purpose of taking depositions of medical doctors in Los Angeles in refutation of the testimony of the government witness, Dr. Putnam, which motion was denied. (Tr. p. 228.) Thereafter the appellees filed another motion to reopen the case in order that "actual scientific tests might be made and obtained by the Post Office Department to determine the efficacy of the tablets sold by the respondents for the elimination or prevention of hunger", which motion was similarly denied.

On December 10, 1945, the Postmaster General made an order forbidding the payment of postal money orders to the appellees and directing the return of mail sent to them, marked "Fraudulent". (Tr. p. 228.)

On January 7, 1946, the appellees commenced an action against the Postmaster of the City of Los Angeles in the District Court for the Southern District of California to enjoin the enforcement of the Postal Fraud Order which had been entered against them. The injunction was denied on the ground that the Postmaster General was an indispensable party to such an action. In denying the injunction, the Court, however, expressed its opinion on the merits of the case in the manner following:

> "In the instant case, except for the evidence of mailing and a chemical analysis of some food tablets—and the chemical analysis bore out the plaintiff's representations—there was no evidence at all before the Postmaster General except the testimony of an employee of the Food and Drug Administration of the government, who testified as a medical expert as to the efficacy, in his opinion, of plaintiff's plan of reducing obesity. Although the record shows that upwards of 50,000 persons had used plaintiff's plan in whole or in part, which included not only dieting but exercises in some cases as well, not one of them, nor any other person, was produced to testify as to any matter at all. The plaintiff was excluded from testifying as to his actual experience with his plan on persons other than himself. And on a motion for reopening to permit medical testimony on behalf of the plaintiff, the motion was denied although the hearings were held in Washington, D. C., and the plaintiff had no notice of the plan of the Postmaster General to produce or rely on medical opinion evidence.

"The McAnnulty case is clearly authority for the proposition that the statute does not authorize the Postmaster General to be an arbiter of medical opinion and to use the terribly effective power of the denial of the mails based solely upon that opinion. In Hannegan v. Esquire, decided February 4th of this year, where the Supreme Court construed the second class mailing statute, they held there that the powers, although just as great under that statute in the Postmaster General as in the fraud statute, did not authorize him to be an arbiter of what was literature or what was art or what was moral." (Tr. pp. 272, 273.)

The case was appealed to the Circuit Court of Appeals of the Ninth Circuit where the judgment was affirmed and to the United States Supreme Court where the judgment was reversed, and the case returned to the District Court for trial on its merits.

Following the reversal in the United States Supreme Court, the appellant filed an answer and appellee moved for summary judgment. The District Court granted this motion and entered a final judgment, dated May 6, 1948, permanently enjoining the appellant from enforcing the fraud order. The opinion of the Court rendered on the 27th of April, 1948 is as follows:

"Repeated examinations of the entire record of the proceedings before the Postmaster General confirms the contention of the plaintiff that the only evidence in such record to support the order is opinion evidence of one Putnam, who identified himself as a doctor employed full time by the

Food and Drug Administration, and who practiced medicine at night and odd times.

"Under the rule of American School of Magnetic Healing v. McAnnulty, 187 U. S. 94 and the numerous cases following it, among which are Jarvis v. Shackelton, 186 Fed. 2d 116, Pinkus v. Walker, 21 Fed. Supp. 610, and Pinkus v. Walker, 71 Fed. Supp. 993, mere opinion evidence is not substantial evidence to support such an order.

"The order of the Postmaster General is not supported by any substantial evidence and it was therefore beyond his lawful authority to issue and is void." (Tr. p. 36, No. 11998.)

All references to the transcript refer to Transcript of Record No. 11317 in the earlier case of *Williams v. Fanning,* unless otherwise entitled, in which case the reference is to Transcript of Record No. 11998.

QUESTIONS INVOLVED.

(1) Whether the fraud order issued by the Postmaster General was unwarranted by the facts.

(2) Whether the fraud order issued by the Postmaster General was unsupported by substantial evidence.

(3) Whether the fraud order was supported only by theoretical, opinion evidence and therefore, properly set aside by the Court below.

(4) Whether the appellee was denied a fair hearing by the Postmaster General and the Postmaster

General's decision to issue a fraud order was not fairly arrived at.

ARGUMENT.

I. A POSTAL FRAUD ORDER WILL BE SET ASIDE WHERE IT IS UNWARRANTED BY THE FACTS.

In his brief appellant has presented a number of decisions on the question of what is the proper standard of review to be followed by a Court which is asked to enjoin the enforcement of a fraud order.

As stated in *United States v. Harrison,* 200 F. 662, 666, many authorities in postal fraud order cases "seem rather extreme." This is perhaps because the fraud orders in those cases were felt to affect the undeserving. However, the tone of the more recent decisions indicates a feeling that the earlier authorities went too far in their zeal to strike down patently fraudulent enterprises.

> "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare."
>
> *Pike v. Walker,* 121 F. (2d) 37.

> "But mail service is not a special privilege. It is a highway over which all business must travel."
>
> *Esquire v. Walker,* 151 F. (2d) 49.

We wish to suggest that the proper standard for review may be found in the Administrative Procedure Act, U.S.C.A. Title 5, Section 1009, and that it is that a fraud order will be set aside if it is unwarranted by the facts. Section 1009 provides, in part, as follows:

> "Judicial review of agency action. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * * So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (b) hold unlawful and set aside agency action, findings and conclusions found to be * * * (5) unsupported by substantial evidence in any case subject to the requirements of section 1006 and 1007 of this title or otherwise reviewed on the record of and agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error."

It is our understanding that the Post Office Department feels that it is not subject to Sections 1006 and 1007 and therefore is not complying with them, because the fraud order statute does not specifically require the holding of hearings. (U. S. Code, Title 39, Section 259.) If this is correct, subsection (5) of 1009 is not applicable, and subsection (6) is applicable.

This suit being an equity action permits a trial *de novo.*

It is appellee's position that the issuance of the fraud order against him was without warrant of the facts and without the support of substantial evidence.

II. A POSTAL FRAUD ORDER WILL BE SET ASIDE IF PURPORTED ONLY BY OPINION EVIDENCE, UNDER THE RULING MADE IN AMERICAN SCHOOL OF MAGNETIC HEALING v. McANNULTY, 187 U.S. 94.

The failure of the Postmaster General to make a determination based on factual evidence deprives the Postmaster of jurisdiction to issue a fraud order. It is true, of course, that the Postmaster has jurisdiction of the subject matter, i.e., the mails, but in order to keep that subject matter from travelling its designated route, by virtue of a fraud order, he must keep his action within the purview of the statute granting him that power, that is to say, he must find as a fact that a scheme or device for obtaining money or property is being conducted by means of false and fraudulent pretenses.

U.S.C.A., Title 39, Section 259.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 S. Ct. 33, 47 L. ed. 90, is one of the leading cases on the subject of postal fraud orders and one which specifically considers the question of the type of evidence on which a fraud order must be based to be valid. In that case the complainants had founded a business upon the proposition

that the mind of the human race is largely responsible for its ills and taught and practiced healing through exercise of the faculty of the brain and mind. The Postmaster had found "evidence satisfactory to him" of fraud, in the opinions of certain doctors who testified for the Government. The Court in setting aside the fraud order said:

> "Can such a business be properly pronounced a fraud within the statutes of the United States?
>
> "Because the complainants might or did claim to be able to effect cures by reason of working upon and affecting the mental powers of the individual, and directing them toward the accomplishment of a cure of the disease under which he might be suffering, who can say that it is a fraud and false pretense or promise within the meaning of the statutes?
>
> "How can anyone lay down the limit and say beyond that there are fraud and false pretenses? The claim of the ability to cure may be vastly greater than most men would be ready to admit, and yet those who might deny the existence or virtue of the remedy would only differ in * * * opinion from those who assert it. There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not

assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity. We may not believe in the efficacy of the treatment to the extent claimed by complainants and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court * * *

"* * * As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method of cure is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud.

"Unless the question may be reduced to one of fact as distinguished from mere opinion, we think these statutes cannot be involved for the purpose of stopping the delivery of mail matter * * *

"* * * Other instances might be adduced to illustrate the proposition that these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis."

The McAnnulty decision has been quoted or cited with approval by the United States Courts approximately one hundred times and as recently as June 4, 1947, *Pinkus v. Reilly,* 71 Fed. Supp. 993. It was cited by the U. S. Supreme Court as recently as February 4, 1946, *Estep v. United States,* 327 U. S. 114. In *Independent Packing Co. v. Houston,* 242 F. 337,

the Court said of the McAnnulty decision: "That whole case is worthy of consideration." In *Moxie Nerve Food Co. v. Holland,* 141 F. 202, the Court said:

> "Proof that testimonials as to particular cures were fictitious would, of course, amount to proof of fraudulent representation of fact, and would be sufficient to debar the complainant from relief; but to say a person who took medicine was cured or benefited thereby seems to be regarded as more in the nature of an expression of an opinion than of a representation of fact." (Citing the *McAnnulty* case.)

In *Pinkus v. Reilly,* 71 F. Supp. 993, which involved a reducing plan, the Court held:

> "The findings as to the effectiveness of the plan, the severity of the diet, and the inherent values of kelp as employed in the kelpidine plan, are not such matters, in the Court's opinion as are subject of proof as an ordinary fact. The rigors of the plan and the claims of its effectiveness as a weight reducing method may be hotly contested, but there remains no exact standard of absolute truth by which to prove the assertions false and a fraud.
>
> "Such a determination seems to me to place this case peculiarly within the ruling of American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, when the court in that case held that: '* * * these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis.' "

Other cases citing the McAnnulty rule with approval are:

National Life Insurance Co. of America v. National Life Insurance Co., 209 U.S. 317;
Peoples United States Bank v. Gilson (DCED Mo.), 161 Fed. 286;
Missouri Drug Co. v. Wyman, 129 Fed. 623;
Public Clearing House v. Coyne, 194 U.S. 496;
Bates & Guild Co. v. Payne, 194 U.S. 106;
Noble v. Union River Logging Co., 147 U.S. 171;
Wis. Central R. R. Co. v. Forsythe, 169 U.S. 46;
Rosenberger v. Harris, 136 Fed. 1001;
Harris v. Rosenberger, 146 Fed. 449;
Jarvis v. Shackleton Inhaler Co., 136 Fed. (2d) 116;
Wallace v. Adams, 143 Fed. 715;
James v. Germainer Iron Co., 107 Fed. 397;
Hurley v. Dolan (*DC Mass.*), 297 Fed. 825;
Harrison v. U.S., 200 Fed. 665, 666.

The rationale of the *McAnnulty* case is that medical opinion is too variable a criterion, too inexact a yardstick by which to measure truth or falsity, in a proceeding involving so severe a civil penalty. It is common knowledge that there are tides of medical opinion akin to fluctuations in other intellectual fashions. Moreover, it has often been observed that experienced practitioners have widely divergent views as to the course of treatment to be used in the treatment of specific disease. The pendulum of medical opinion hav-

ing reached the top of its arc frequently descends in quite the opposite direction.

It was ably stated in *Stunz v. United States,* 27 F. (2d) 575:

> "Medicine is not an exact science. A respectable amount of authority can be cited to dissipate the value of any recognized method of treating disease. * * * The so-called quack remedies of today may be held tomorrow as an absolute cure and vice-versa. Vaccination, for instance, is believed by a large majority of the medical profession to prevent small-pox. Others with equally sincere opinion advocate the contrary view.
>
> "When the white man and the Indian hunted together and the meat divided up, the liver, discarded by the white man, was prized by the Indian for its medical properties. Today, it is prescribed by the medical profession as a certain cure for pernicious anemia. Not many years ago the so-called Chinese herb doctors were prosecuted under this identical statute for representing that portions of dried fish, especially the head, were a sure cure for heart trouble. It is now established that adrenalin which can be obtained from certain kinds of fish is a powerful heart stimulant."

Concededly, the McAnnulty rule does not extend to expert testimony concerning scientific tests or experiments conducted by the witness to determine the efficacy of the product.

> "Testimony of experts that is based upon tests or experiments made by them does not come

within the ambit of the McAnnulty rule." *Research Laboratories v. United States,* 167 F. (2d) 410, 415. See also *United States v. 7 Jugs of Dr. Salsbury's Rakos,* 53 F. Supp. 746; and *Elliott Works v. Frisk,* 58 F. (2d) 820.

Quite naturally, where it can be conclusively demonstrated by tests that the representations made are false, testimony of such tests is credited as being factual rather than opinion.

> "Qualified members of appellee's profession testified that his representations could not be and had not been fulfilled." *Farley v. Heininger,* 105 F. (2d) 79.

However, these cases have no application here where no scientific tests or experiments were conducted to determine the efficacy of appellee's plan, and the opinions of the witness, Dr. Putnam, were unsupported by any factual demonstration.

Similarly, the McAnnulty rule has not been applied in cases in which the product was extravagantly advertised as a panacea for all ills and the evidence indicated that the product had very little therapeutic value (*Leach v. Carlile,* 258 U.S. 138) or was completely worthless. (*Neher v. Harwood,* 128 F. (2d) 846; *Kar-Ru Chemical Co. v. United States,* 264 F. 921.)

In *Leach v. Carlile,* supra, Organo Tablets were advertised as "recommended and prescribed by leading physicians throughout the civilized world for nervous weakness, general debility, sexual decline or

weakened manhood and urinary disorders * * * sleeplessness and run down system and other disorders." The advertising indicated that the tablets were a "panacea" for every illness known to man. There was in the record considerable testimony that the remedy was absolutely without value, although some witnesses credited it with having slight value. The Court also observed:

> "Appellant is an old offender, a prior fraud order having been issued against him under another name in April, 1918, as a result of which he changed his trade-name and modified in a measure his advertising matter."

None of the elements which brought *Leach v. Carlile* outside of the McAnnulty rule are present in this case. Here, the product was not offered as a panacea for all ills, but as a means of reducing excess weight. Incidentally, panacea is defined in *Webster's International Dictionary of the English Language,* as:

> "A remedy for all diseases; a universal medicine; a cure-all * * *"

Here, the product sold was not worthless or of a slight value, but was admittedly efficacious to reduce the weight of everyone who tried it. And here there is no intimation that appellee is an old offender, a knowing and habitual violator of the postal laws. His record is clean, having had no difficulties with the Post Office Department before this one.

The McAnnulty rule has not been applied to cases involving lotteries, for the reason that opinion testi-

mony has not played a significant role in hearings on such cases. In these cases the facts have been largely admitted and the Court has centered its discussion around the question of whether the Postmaster was incorrect in determining that the particular plan involved was a scheme designed to defraud persons, and, thus, the Courts have not had occasion to consider the question of the *type* of testimony on which the Postmaster may base his fraud order. It is from these cases that such expressions as "the exercise of this jurisdiction by the Postmaster General is due process of law and his decision will not be disturbed, unless he has exceeded his authority or his action is palpably wrong" (*New v. Trebond Sales Corporation,* 19 F. (2d) 671) and "his action will not be reviewed by the Court in doubtful cases" (*National Conference on Legalizing Lotteries, Inc. v. Farley,* 96 F. (2d) 861) come. Since opinion testimony of experts was not involved in these cases, the expressions taken from them should not be construed as limiting the evidentiary requirements of the *McAnnulty* case.

There are some indications in the record that there is a difference of opinion on the medical issues involved in this case. The affidavits of Dr. Charles J. Pflueger and Dr. M. John Beistel directly controvert the opinions of Dr. Putnam. (Tr. pp. 261, 262, 263, 164.) Then there was testimony by the appellee, who, although a layman, is widely experienced in weight reduction work, to the effect that the massage cream is an astringent (Tr. p. 176), that the tablets satisfy hunger (Tr. pp. 191, 205) and give more energy (Tr.

pp. 192, 204), and help keep a person physically fit. (Tr. p. 206.)

In the instant case the only evidence of lack of merit in complainant's preparation was that of Dr. Lawrence E. Putnam. He was the only witness who testified for the Government on the question of the merits of the preparation. Dr. Putnam had never prescribed the product for anyone and had never examined or observed anyone who had used the complainant's preparation. Just as in *Pinkus v. Reilly,* supra, the merits of the complainant's reducing plan are a matter of opinion and, "question of whether the methods of treatment for obesity as suggested by the plaintiff's reducing plan, are in fact without benefits, or are so far from producing results claimed by the method or treatment advocated as to amount to a fraud on the users thereof, was not the kind of question intended to be submitted for decision to the Postmaster General".

The Postmaster General has been repeatedly restrained by the Courts from giving the force and effect of law to his personal opinions on matters concerning which ideas change with the times and opinions pro or con are unsupportable by conclusive facts.

For that reason the Courts held in the cases of *Esquire v. Walker,* 151 F. (2d) 49, and in *Hannegan v. Esquire, Inc.,* 327 U.S. 146 (February 4, 1946) that even though the Postmaster General had five clergymen (among whom was a Bishop) to support his decision, since their testimony was opinionate, the evi-

dence was insubstantial and did not support the postal fraud order. Said the Circuit Court: "Once we admit the power claimed here we see no room for the effective judicial review of its exercise. And so in practical effect it amounts to a power in the Postmaster General to impose the standards of any reputable minority group on the whole nation." Said the Supreme Court in affirming: "But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system * * *" Certainly, it is likewise not the prerogative of the Postmaster General to set the standards of medical practice in controversial matters, and to determine what are the proper remedies for the treatment of obesity.

III. THE FRAUD ORDER ISSUED HEREIN WAS NOT BASED ON SCIENTIFIC FACT BUT WAS BASED ON OPINION TESTIMONY OF SUCH A VAGUE, INACCURATE, UNRELIABLE CHARACTER THAT IT IS NOT ENTITLED TO BELIEF AND SHOULD NOT BE CREDITED AS SUBSTANTIAL.

Substantial evidence is evidence which is not vague or uncertain but which is factual, definite, and convincing.

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. It must be of such a character as to afford a substantial basis of fact from which the fact in issue can be reasonably inferred. It excludes vague, uncertain or irrelevant matter. It implies a quality and character of

proof which induces conviction and makes a lasting impression on reason." *Carlay Company v. Federal Trade Commission,* 153 F. (2d) 493, 496.

In the present case there were four witnesses for the government, Post Office Inspector John W. Davis, who identified certain pieces of the appellee's advertising matter, Frank W. Casey and William V. Eisenberg, chemists, who gave analyses of the appellee's tablets and massage cream, and Lawrence E. Putnam, M.D., who gave opinions of the efficacy of appellee's reducing plan. The opinions of this last witness were in many instances so weak and inaccurate as to raise the suspicion that they were mere guesses.

His qualifications were not impressive. He had graduated from a medical school in 1934, interned at several hospitals until 1938, was with the Veterans' Administration and Civilian Conservation Corps until 1942, and since then he has been employed by the Food and Drug Administration in the capacity of a label reader. (Tr. p. 103.) In his early years he did not practice for periods of more than three months at any one time, and since coming to Washington he has engaged in private practice only at night and on week-ends. (Tr. p. 105.)

At no place in his testimony did this witness contend that appellee's reducing plan would not reduce obese persons to the degree represented, nor did he question that the persons whose testimonial letters appear in appellee's advertising matter actually sustained the weight loss reported.

He was asked how he would treat obesity (Tr. p. 108), and thereupon he proceeded to tell about his system of treatment. (Tr. pp. 108-120.) Certainly the fact that a witness uses a certain method of treatment is not substantial evidence that other methods of treatment are worthless, undesirable, or fraudulent.

Before appellee sells his plan to a person, he requires such person to fill out an analysis chart (Exhibit 5C-3) and give information on the following subjects: (1) Height; (2) Weight; (3) Greatest and lowest weight in the last ten years; (4) Age; (5) Waist measurement; (6) Hip and bust measurements! (7) Nationality; (8) Occupation; (9) Can you exercise; (10) Use of tobacco; (11) Use of liquor; (12) Use of soft drinks; (13) Use of laxatives; (14) Is elimination good; and (15) Any operations. (Tr. p. 74.) The witness criticized this information as inadequate (Tr. p. 115) but admitted that the information he would ask a patient for is his age, sex, occupation, previous history of disease, family situation, and income. (Tr. p. 109.)

The witness was allowed to testify that he thought a physical examination should precede weight reduction (Tr. p. 112) despite the fact that a great many people the world over manage the problem of weight control themselves without ever seeing a doctor.

When the witness got to the matter of analyzing and commenting on appellee's reducing diet, he became guilty of some very glaring inaccuracies.

> "Q. You will recall perhaps that I handed to you for ready reference Exhibit 4-D-1, which is

the diet plan sold by respondents, and you will note that there are two phases of the diet, one prescribing two meals a day at the outset and then you go on a three meal a day diet. Can you tell us or will you tell us the average number of calories provided daily under these plans?

A. In the two meal a day food plan the average number of calories in the breakfast is about 250, the average number of calories in the dinner is 350, a total of about 600 calories daily. This does not include the days number 4 and 8 when the tablets are taken with fruit or vegetable juice or soup. On these days the caloric intake would be very low, somewhere between 75 and 150 or more calories.

Q. You mean for the whole day, Doctor?

A. For the day. On the three meal a day reducing food plan the average number of calories taken at breakfast would be 150 calories and the average for each of the other two meals, luncheon and dinner, would be about 350 calories, making a total of about 750 calories daily except on those days when the tablets are taken with fruit or vegetable juice and no meals are eaten. Those are days number 3, 6 and so on.

Q. Going back to the first part of this program, the days when the patient takes nothing but the tablets and the accompanying liquids, how many calories on an average would he consume on the whole day?

A. I am sorry I may have made a mis-statement. I believe I said 75 to 150 or more calories. That would apply to each glass of fruit or vegetable juice or soup and if that were taken several times a day the number 75 to 150, or roughly a

hundred, would have to be multiplied by the number of glasses of juice or soup that were taken.

* * * * * * *

Q. There is a statement on the attached page that one should not take more than 10 tablets a day and on the tablet days on the diets it is indicated that one should take two or three tablets every three or four hours. Assuming he took two each time that would mean that five times during the day he took these tablets accompanied by some liquid. So that would total, Doctor, how many calories on an average for the day?

A. Well, if you consider that the average juice or soup would be about 100 calories and if that were taken five times a day that would be about 500 calories per day." (Tr. pp. 121, 122, 123.)

The exhibit to which counsel for the Post Office Department and the witness were referring contains the only directions for taking the tablets set forth in the record. These directions provide as follows:

"Take 1 tablet before breakfast, 2 at noon, and 2 tablets before dinner. Anytime during the day when you feel hungry take 1 or 2 tablets (not to exceed 10 tablets).

"Don't chew the tablets, swallow them with ½ glass of fruit juice, skim milk, or if it is a cold day take with hot soup or broth. If at work and you cannot have the fruit juice, take them with water.

"The day that you are exclusively on the Food Tablets, take 2 or 3 tablets during the day when hungry. Take tablets with water, fruit juice, soup or skim or buttermilk. When following a 2 meal day food plan go every 4th day taking only the

Food Tablets. When following a 3 meal day food plan, go every 3rd day taking only the concentrated Food Tablets."

From the above several errors readily become apparent.

1. On simple arithmetic the average caloric intake for the three meal day should be 850 calories and not 750 as stated by the witness.

2. The purchaser is directed during both the two and three meal day to take up to ten tablets with accompanying juice, broth or milk. These are to be taken one or two at a time with liquid whenever the person feels hungry. If these ten tablets are taken two at a time in the manner suggested by counsel, this would add 500 calories to the daily intake, making an average of not 600 but 1100 for the two meal day and not 850 but 1350 for the three meal day. Since the witness said the accompanying liquid would provide from 75 to 150 "or more" calories, the daily intake under each plan might be even greater. Also since the tablets may be taken one at a time, instead of two at a time, except at luncheon and dinner, this could add an additional 300 calories to the daily intake, making the average intake for the three meal day 1650 calories and for the two meal day 1400 calories. This is all premised on what we feel to be the fair assumption that, since these diets are very flexible and their purpose is stated to be to keep the user from becoming hungry needlessly, users will so use the plan and take the tablets in such a manner as to afford them the greatest possible degree of comfort.

3. Although the directions state a ten tablet limit for two and three meal days, they state no such limitation for the days on which just tablets and liquids are to be taken. The user is directed to take tablets and liquids "when hungry". Thus the caloric intake for the meal-less day would be 100 calories multiplied by the number of times the user of the plan became hungry.

Thus when in reply to the question how great a caloric reduction the plan would make in the diet of average obese person the witness said from 3500 or 4000 down to 600 (Tr. p. 124), his answer was based on a misconception of the plan and what it provides. When he stated immediately thereafter that such a diet would not be an easy diet for an obese person to follow (Tr. p. 124) he was obviously thinking of a 600 calory diet and not of the caloric intake provided by the appellee's plan. Similarly we think that when this witness testified about the safeness and strictness of the plan, he was under a misapprehension as to what the plan really provides.

But not only was the witness at sea as to the details of the diet plan, he obviously knew little about the ingredients contained in the tablets and massage cream. The formulas of the tablets and cream were not submitted to him, but he stated that he had been present when earlier witnesses had given the analyses. (Tr. pp. 127, 132.) He did not state, however, that he was familiar with the nature, or character, or properties, or therapeutic or nutritional values of the various ingredients of these preparations, nor that

he had ever used any of them in his practice, or observed their use by others, or personally made or witnessed any scientific tests to determine their efficacy for the purposes for which they are used in appellee's preparation. The record is silent on these things, and it can safely be assumed that the witness did not have much knowledge of these ingredients or diligent counsel for the Post Office would have had him disclose it. Indeed, the witness said, "I do not use drugs in the treatment of obesity." (Tr. p. 141.)

On the issue of safety the witness, still under a misapprehension as to what the plan provides, said:

> "A. Well it is conceivable that a patient may have had tuberculosis. The patient may have been made overweight purposely by a physician. The purpose of making a patient overweight is to keep him on the good side of health. If he loses weight he may expose himself to a reactivation of the tuberculosis * * *" (Tr. p. 110.)

We submit that a person who knows he has tuberculosis and had been under treatment for it by a doctor is very unlikely to undertake a reducing program.

The witness also said reducing might be harmful in diabetes. This was the only other condition specified by him in which reducing is contra-indicated. Here, too, the patient usually knows he has diabetes, is under medical supervision, is on a rigid diet, and is not apt to undertake a different diet without his doctor's advice.

We think the following two answers by the witness on the issue of safety are interesting:

"A. Well, I know for a fact that many people never consult a physician and do reduce and are not harmed by it. That's why I say it may not be safe rather than it is not safe." (Tr. p. 145.)

"A. I don't know of anybody that has bought that plan (appellee's) but so far as I know they might have reduced safely." (Tr. p. 145.)

Concerning hunger pains the witness testified:

"Q. You have indicated that there is a possibility or I believe you have, that if one takes these tablets with fruit juice or buttermilk or the others the hunger pains might disappear.

A. Yes, they may.

Q. Is that a temporary effect or is that a lasting effect?

A. Of course it is temporary." (Tr. p. 155.)

To establish that this witness's testimony was mere opinion as distinguished from scientific fact, we have this statement:

"To determine whether or not the hunger pains were eliminated, if they were, by the tablets one would have to set up a control experiment and a scientifically controlled experiment can be done in any laboratory by the use of a kymograph that I mentioned and the balloon in the stomach and so on. One could really find out the effect of the various things that are put into the stomach on hunger contractions that way." (Tr. p. 154.)

Yet neither the Post Office Department nor the witness who had laboratory facilities at the Food and Drug Administration were enough interested in really finding out the effect of the tablets in the stomach, to

have a test made. Instead they chose to rely on mere opinion or guesswork. Certainly this hardly indicates that the Post Office Department availed itself of "the unlimited professional resources" of the Food and Drug Administration.

In view of this state of the record can the trial Court be criticized for finding no substantial evidence in the record to support the fraud order? No other finding could have been made in view of the lack of qualifications of the only medical witness, the unstable character of his testimony, his misapprehension as to what appellee's plan provided, his complete lack of experience with the subject matter involved, and his failure to make scientific tests which might have produced facts on which an administrative officer or Court could rely. When the trial judge in his Memorandum (Tr. p. 36—No. 11998) refers to

> "* * * the opinion evidence of one Putnam, who identified himself as a doctor employed full time by the Food and Drug Administration and who practiced medicine at night and odd times",

he was making it crystal clear that he not only felt the witness to be unqualified but also felt his testimony to be worthless, without weight and unsubstantial.

This case is analogous to that of *Jarvis v. Shackleton Inhaler Co.,* 136 F. (2d) 116, wherein, as here, the only testimony adduced before the Post Master General was that of a Post Office Inspector, a chemist, and a doctor employed by the Food and Drug Administration, who testified from theoretical knowl-

edge as to the symptoms, causes and treatment of certain diseases of the upper respiratory tract, and the probable effect of the use of the inhalant upon those diseases for which it was recommended. The District Court enjoined enforcement of the fraud order on the ground that there was no substantial evidence to support it, and this decision was affirmed on appeal by the Circuit Court of Appeals (6th Cir.).

The Court in that case declared:

> "That it did reach many (cases of respiratory trouble) is undisputed from the testimonials. There was no challenge to the truth of the testimonials except the testimony of a physician, reasoning from a theoretical and incomplete knowledge of the compound, that doctors would have used greater quantities of the drugs, and would never have employed the compound as the sole method of treatment." (p. 119.)

In the present case there is also no challenge to the truth of the testimonials. The only medical testimony here is also the theoretical testimony of a Food and Drug Administration doctor based on an erroneous understanding of the reducing plan under consideration.

The appellant in his brief has cited a number of cases as holding that opinion testimony of the type presented here may be accepted as substantial. These are for the most part decisions in Federal Trade Commission and Food and Drug Administration cases in which the records are lengthy and contain the testimony of many reputable, disinterested medical wit-

nesses. None of them except perhaps *Cable v. Walker,* 152 F. (2d) 23, involve the flimsy, weak record presented in this case, and we except *Cable v. Walker* only because the decision fails to show the nature and extent of the testimony in that case. That decision referred to "considerable testimony" "by expert government witnesses" and there is no indication that such testimony was subject to the same objections as the testimony in the case at bar.

In *Fulton v. Federal Trade Commission,* 130 F. (2d) 85 there was involved a worthless remedy for an incurable disease, diabetes, and the witnesses for the Commission were shown to possess wide knowledge in the field under inquiry. In the present case we have a concededly efficacious treatment for obesity and a single witness possessing very little, if any, knowledge of the field under inquiry.

In *Dr. W. B. Caldwell Inc. v. Federal Trade Commission,* 111 F. (2d) 889, ten qualified physicians testified for the Commission. In *Charles of the Ritz Distributors Corp. v. Federal Trade Commission,* 143 F. (2d) 676, two medical experts, one a leading dermatologist, testified for the Commission. In *United States v. One Device,* 160 F. (2d) 194, the government presented the testimony of five medical experts fully familiar with principles on which colonic irrigators work. In *Alberty v. Federal Trade Commission,* 118 F. (2d) 669, the Commission's order was supported by the testimony of doctors, established to be experts, of both the allopathic and homeopathic schools. In *Neff v. Federal Trade Commission,* 117 F.

(2d) 495, six doctors testified for the Commission that they were well acquainted with the ingredients (quinine, Epsom salts, etc.) of the preparation in question, had used them many times in their practice, and that such ingredients would not be helpful for prostatitis. In *United States v. 50 3/4 Dozen Bottles of Sulfa-Seb,* 54 F. Supp. 759, the medical experts who testified for the government were of outstanding qualifications.

In *United States v. 7 Jugs of Dr. Salsbury's Rakos,* 53 F. Supp. 746, the Court pointed out:

> "Scientific witnesses for the Government in this case made elaborate and comprehensive tests of claimant's remedies under conditions most favorable to the remedies. * * * The report of such tests showed conclusively that the remedies were absolutely worthless."

In *Justin Haynes and Co. v. Federal Trade Commission,* 105 F. (2d) 988, there was testimony by three well qualified expert witnesses called by the Commission, and "after extensive hearings an order was entered."

In *Elliott Works v. Frisk,* 58 F. (2d) 820, there was involved a product called Nu Life which was advertised as a means of recharging batteries. The United States Bureau of Standards conducted tests in which they placed the preparation in all but one cell of each of a number of batteries and then later tested all cells for comparison purposes, with instruments which showed electrical energy increase, capacity, specific gravity, etc. The experts from the Bureau of Standards testified that no difference was found be-

tween the cells containing Nu Life and those which did not contain it.

When on page 27 of his brief the appellant says that "scientific investigations and tests" had been made of the tablets and massage cream by the Food and Drug Administration, he is not talking about the same thing that the Court in the *Frisk* case is when it refers to such tests and investigations. In the *Frisk* case and the other cases which refer to tests what is meant are tests to determine the value and efficacy of the preparation for the purpose for which it is offered. No such tests were made in the present case. The only tests made in this case were analyses which shed no light on the real issues involved in this case, especially since they merely bear out the accuracy of the list of ingredients contained on the labels. (Tr. pp. 94, 96.)

In *Goodwin v. United States,* 2 F. (2d) 200 the Court held that a medical expert must have knowledge of the drug elements and their efficacy or lack of efficacy as curative agents. This is a type of knowledge not possessed by the medical witness in this case.

In *Research Laboratories v. United States,* 167 F. (2d) 410, the evidence included "controlled clinical studies" conducted by two eminent, disinterested physicians. These tests consisted of the giving of the product in question to a substantial number of patients over a period of a number of months.

All of these cases are a far cry from what was done in this case. We earnestly submit that it would be a

most unfortunate precedent for this Court to permit an administrative officer, possessing the power to completely destroy a business and brand its owner as a fraud even among his social correspondents and the people he does business with locally, to exercise that drastic power on the basis of a record so barren of facts as this one is.

There is another element which we hesitate to inject because of our high respect for the men who comprise the Food and Drug Administration. However, a doctor who works full time in the Food and Drug Administration reading labels and trying to find something wrong with them, not only becomes far removed from the realm of practical medicine but also may acquire a prosecutor complex. It is difficult for a doctor in that situation to remain completely unbiased and disinterested.

The record in this case is silent on the question of whether Dr. Putnam participated in the preparation of this case, but it is abundantly clear that the past seven years he has spent censoring labels. (Tr. p. 103.) There are also indications in the record that this case was at the Food and Drug Administration first before being acted upon by the Post Office Department. (Tr. p. 58.)

We contend that a fraud order should never be based on uncorroborated opinion testimony, particularly not on the uncorroborated opinion of a single doctor who is engaged primarily in the examination and criticism of labels for the Food and Drug Administration. Not only is there always present the ques-

tion of interest and bias on the part of such a witness but also there is the question of whether such a witness possesses sufficient practical medical experience to express a completely reliable opinion.

Requiring corroboration by way of scientific tests and the testimony of disinterested, practicing doctors is not a road block to protection of the public welfare. Corroboration of this kind should not be difficult to procure in cases of actual fraud. Respondents in these proceedings are entitled to certain rights. They are not to be presumed guilty merely by reason of service of an order to show cause on them. If the most severe civil penalty we know of is to be imposed on them, it should be imposed only on the basis of reliable, factual evidence.

Let us consider briefly the advertising claims used by appellee. He did not represent his plan as a cure-all panacea. Rather he says follow this plan and you will lose weight and feel better, and these claims are not challenged in this proceeding.

The appellee is charged with representing that his diet is not a strict diet. We fail to find this claim in his sales material. Also, nowhere in the record is a definition of what a strict diet is and Dr. Putnam said that both high and low diets may be strict. (Tr. p. 121.) Users of appellee's plan were given the choice of two meals a day or three meals, were allowed to take tablets and various types of liquid foods when hungry, and were allowed some choice in selecting their menu.

Terms such as "strict", "easily", "beautify", "wonderful", "amazing", "perfect", and "quickly" fall in the category of words which have been held to constitute justifiable puffing. In *Kidder Oil Company v. Federal Trade Commission,* 117 F. (2d) 892, 901 (7th Cir.) the Court held that the use of the words, "amazing" and "perfect", as applied to a petroleum product, was not deceptive and said, "Such terms are largely a matter of personal opinion."

In *Carlay Company v. Federal Trade Commission,* 153 F. (2d) 493, 496 (7th Cir.), the Court held that the terms "easy" and "simple" in describing a weight reducing plan, are comparative terms and constitute mere puffing. It further ruled:

> "What was said was clearly justifiable, under the circumstances, under those cases recognizing that such words as 'easy', 'perfect', 'amazing', 'prime', 'wonderful', 'excellent', are regarded in law as mere puffing or dealers' talk upon which no charge of misrepresentation can be based." Citing authorities.

In the *Carlay* case the weight reducing plan sold was somewhat similar to the appellee's plan in that it consisted of a diet and candy which was consumed between meals to allay hunger and inhibit the appetite. The cease and desist order issued against the petitioner was set aside.

Another case involving a weight reducing plan, in which a fraud order was issued and enforcement of it was enjoined by the Federal District Court, is *Pinkus v. Walker,* 61 F. Supp. 610. The Court in that case

had this to say in criticism of the Post Office Department concerning itself with the safety of a reducing plan:

> "If as a matter of fact, the course suggested by the complainant in his advertising is deleterious to health, it would appear that the remedy lies in other fields than those governed by postal regulations. Too frequently attempts are made to accomplish by indirection that which should be effected straightforwardly and directly. Surely the powers of government to protect the health and well being of its citizens can be better met by supervising agencies within the actual scope of medical control and by expert regulation, than by more or less arbitrary prohibition by the Post Office Department."

Both the Federal Trade Commission and the Food and Drug Administration have medical departments. Perhaps it would be wise to reserve control of this aspect of reducing plans to those departments best qualified to exercise such control.

IV. THE APPELLEE WAS DENIED A FULL, FAIR AND IMPARTIAL HEARING, AND THE POSTMASTER GENERAL'S DECISION TO ISSUE A FRAUD ORDER WAS NOT FAIRLY ARRIVED AT.

The Post Office Department commenced its investigation of appellee by clipping his advertisements out of magazines around October 29th, 1944. (Tr. p. 58.) The Department spent seven months leisurely preparing its case and then on May 25, 1945, mailed an order

to show cause which appellee received on May 29, 1945, commanding him to make a defense to the charges in Washington, a city 3000 miles away, on June 20, 1945. (Tr. p. 46.) The Department took seven months to prepare its case and gave appellee only three weeks to prepare his.

America was at war. Automobile travel was impossible. Train accommodations to the Atlantic coast were very difficult to obtain. Getting to Washington in three weeks for the hearing was, in itself, a major accomplishment, without even considering the matter of preparing a defense.

The notice served on appellee gave meager information about what he was required to meet at the hearing. It set forth only the Department's interpretation of the meaning conveyed by appellee's advertising without indicating the portions of such advertising on which the charges were based and where and when such advertisements had been mailed. (Tr. pp. 220, 221.) Appellee's answer filed in this proceeding alleged that the charges were not definite enough to enable him to make a defense. (Tr. p. 52.)

The notice in no way indicated that only the testimony of physicians would be received on the issues involved in this case. The appellee and his counsel were unfamiliar with the procedure followed in these cases before the Department. Perhaps, if they had been given adequate time in which to prepare a defense, more thorough preparation might have disclosed to them the necessity for medical testimony.

Because of the war, doctors everywhere were extremely busy taking care not only of their own patients but also of patients of doctors who were in military service. Procuring a doctor on such short notice to leave his practice for a week and testify in this case would have proved impossible even if the appellee had attempted it.

Then to make the proceeding completely unfair the Solicitor's office on June 18th, only two days before the hearing, mailed to appellee an additional charge (Tr. p. 47) which he did not and could not have received before leaving for Washington. (Tr. p. 49.) This amendment to the charges was allowed by the hearing officer over appellee's objections. (Tr. p. 49.)

At the beginning of the hearing appellee's counsel asked for additional time in which to present his case, but this was denied by the hearing officer's ruling that he would not "try these hearings piecemeal." (Tr. p. 48.)

The Department called to the stand its medical witness, and it became apparent that although scientific tests could have been performed to determine some of the facts in issue they had not been performed. (Tr. p. 154.) The witness was allowed to give purely opinion testimony. The appellee was put on trial on the basis of the witness's ideas of how obesity ought to be treated. (Tr. p. 108.) The witness was even allowed to give his opinion of whether the writer of a testimonial letter might have been injured by the reduction of weight experienced even though he

had never seen or examined such person. (Tr. pp. 116, 119.)

Testimony by the appellee concerning the efficacy of his plan was excluded although he is a physical trainer of many years' experience and has reduced the weight of over 50,000 persons and his plan is non medical in character. (Tr. pp. 158, 160, 161, 164.) His testimony should have been received under all the circumstances of this case under the exception to the rule on expert witnesses "which permits a witness possessed of special training or experience to testify to his opinion when it will tend to aid the jury in reaching a correct conclusion." *U. S. Smelting Co. v. Perry,* 166 F. 407. Although the hearing officer would not permit appellee to testify on direct examination to any medical matters, he permitted counsel for the Department to cross-examine appellee at great length on such matters. (Tr. pp. 192 to 212, incl.)

In the conduct of his business appellee had received testimonial letters from several thousand satisfied customers. The hearing officer refused to receive these in evidence (Tr. pp. 167 to 171, incl.) although a dealer may in good faith upon receiving testimonials and relying thereon use them and the statements therein as the basis for representations and promises to customers and such testimonials are in such case admissible as evidence. *Goldstein v. United States,* 63 F. (2d) 610; *Dr. J. H. McLean Medicine Co. v. United States,* 253 F. 694, 697. These testimonials were conceded by counsel for the Department to be genuine (Tr. p. 170), and they contained statements

supporting those advertising claims charged by the Department to be fraudulent. (Tr. p. 174.) The appellee apparently relied on these letters in making advertising claims. (Tr. p. 167.)

Counsel for appellee thereupon informed the hearing officer that it would be probably impossible to obtain medical witnesses with the inadequate time remaining. (Tr. p. 164.) He and appellee were 3000 miles from home in a strange city where they knew no doctors. There was no possibility to subpoena a medical expert, because the postal statutes do not provide for such a procedure. As was stated in the Final Report of the Attorney General's Committee on Administrative Procedure, Senate Doc. 8, 77th Cong., 1st Ses., P. 154:

> "The postal statutes make no provision for the issuance of subpoenas by the Department in the case of fraud order hearings. While this does not seriously hinder the Department in the presentation of its case because of the availability and willingness of its witnesses (postal inspectors and Government experts), the respondent may face serious difficulties in obtaining the presence of witnesses who must usually travel far and are often unwilling to testify 'against the government'."

The hearing concluded without the appellee presenting a medical witness. On August 10, 1945, and four months before the decision by the Postmaster General in this case, appellee retained new counsel who immediately filed with the Department a motion

for permission to take the depositions of Dr. Charles Pflueger and Dr. M. John Beistel on behalf of the appellee at Los Angeles. Later another motion was filed that all possible scientific tests be made to determine the efficacy of the tablets in the prevention of hunger. Both of these motions were denied. (Tr. pp. 227, 228, 261, 262, 263, 264.)

Although the postal statutes do not specifically provide for the taking of depositions, we know of no provision which prohibits the Postmaster General from receiving in evidence and considering such depositions. Refusal to receive depositions in this case imposed a heavy burden upon appellee, for medical testimony in his favor was procurable but could not be presented at Washington because of conditions caused by the war.

> "The fraud order section has only one hearing officer, who hears approximately 100 cases annually. All hearings are held in Washington, D. C. In addition the Department has made no provision for a deposition procedure. The unavailability of depositions, when coupled with the holding of all hearings in Washington, D. C. imimposes a heavy burden upon respondents whose places of business or whose witnesses are not close at hand." Report of the Attorney General, supra, pp. 152, 153.

The Department denied the motion for the taking of scientific tests of the tablets, although they had granted such a request in *Farley v. Heininger,* 105 F. (2d) 79, 83, in which they assigned a post office inspector and a dentist to take an extended tour through

ten states and check with respondent dentures made by him to determine whether they fit the purchasers thereof.'

Then on December 10, 1945, the Postmaster General issued a fraud order not only against Al Williams Health System, Al Williams, Health Conditioner, Al Williams, Physical Conditioner, and the Williams Health System but also against appellee's personal name, Al Williams, although it was apparent that he also received under that name social and personal correspondence and possibly mail concerning a local health establishment which he operates in Los Angeles.

In *Donaldson v. Read Magazine,* 68 S. Ct. 591 (March 8, 1948) the Supreme Court refused to reinstate a fraud order until the Postmaster General had deleted the name of an individual, Henry Walsh Lee, from the order and gave assurance that the designation contained in the order, "Judith Johnson, Contest Editor", would not be construed to bar delivery of mail addressed to "Judith Johnson", so as to free the fraud order of constitutional objections. The Supreme Court made it plain by its action that where a business is conducted principally under certain trade names a fraud order should not include a personal name which also happened to be used in connection with the business.

It is our feeling that a fraud order proceeding should not have been brought against appellee. He was selling an admittedly efficacious plan for reducing and was offering it solely for obesity. If the Government felt that some representations incidental to the

selling methods were misleading, the milder injunctive proceedings of the Federal Trade Commission would have been more appropriate. The Attorney General's Report, supra, expresses a very sound view of the purpose of fraud order procedure:

> "The Federal Trade Commission strikes down only the fraudulent representations and other deceptive features of an enterprise through the issuance of a cease and desist order; the Post Office Department, on the other hand, has the power to destroy the entire business insofar as it is dependent upon the receipt of any mail (whether or not the mail is connected with the fraud)."
>
> "The Committee recommends that further conferences between officials of the two agencies be held to map out a general program whereby the Commission will take jurisdiction over respondents whose business is in the main legitimate but some of whose representations are fraudulent, while the Department will prosecute cases involving respondents whose business is inherently fraudulent and the use of the mails is an integral part of the business." (pp. 154, 155.)

CONCLUSION.

There is no law which prohibits the sale of a weight reducing plan through the United States mails. The Al Williams plan will admittedly reduce the weight of purchasers of it so that it cannot be said to be inherently worthless or fraudulent. We do not agree with appellant when he says that weight reduction is necessarily painful and discouraging, and the record

does not bear out this contention nor that reducing by means of appellee's plan will be attended by great discomfort.

Appellant's own medical witness admitted that taking tablets with fruit juice, milk or broth will satisfy hunger, and appellant is in error when he contends that the plan at best provides only 750 calories per day. The plan provides for a caloric intake two or three times larger than this amount.

There was no reliable testimony on the hunger relieving qualities of the tablets, appellant's witness having no knowledge of or experience with the ingredients and the test which would have produced scientific data on this issue not having been made. Appellee's request that this test be made was denied by the Department. Concentrated nutrition by use of tablets of this type is a subject which the Department, possessing no medical facilities, is not in a position to know a great deal about, and the value of concentrated nutrition is certainly not a subject for the determination of the Postmaster General.

The affirmance of the fraud order is not required to enable the Postmaster General to continue to carry on his necessary activities in purging the mails of swindles, confidence games, and grossly fraudulent schemes. But the setting aside of this order is required to protect the rights of individuals who are cited to appear before the Department and assure them that they are entitled to a fair hearing and will not be branded as a fraud in the eyes of their family, friends, customers, and all the people they do business

with or receive correspondence from, except on substantial, convincing, reliable, factual evidence.

The judgment below should be affirmed and the appellant's appeal dismissed.

Dated, Milwaukee, Wisconsin,
November 22, 1948.

Respectfully submitted,
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